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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-921

NEWPORT ASSOCIATES, INC.,
Petitioner,

against

SHELDON H. SOLOW,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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January 25, 1973

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Question Presented

The question as stated in the petition assumes that the Zoning Resolution attacked, rather than constituting a limitation on respondent's use of his property, is a grant to respondent of property rights belonging to petitioner.

Properly stated the question is: Do the provisions of the New York City Zoning Resolution, which limit the floor area that may be built on land owned in fee by respondent, deprive petitioner of its property because the allowable floor area for respondent's building includes an unused floor area of a contiguous parcel under long-term lease to respondent with reversion to petitioner?

Statement of the Case

Respondent, Sheldon H. Solow, is the owner in fee of a parcel of land located between West 57th and West 58th Streets in New York City on which he has constructed a new office building. Respondent is also the owner of a long-term leasehold in a contiguous parcel located at 4 West 58th Street. Subject to respondent's lease, petitioner owns the fee in the contiguous parcel, *i.e.*, petitioner owns the reversion.

The New York City Zoning Resolution limits the floor space of a building to a multiple of the area of the building's zoning lot. The Zoning Resolution permits the combining of two or more contiguous parcels into one zoning lot if they have a common owner. "Ownership," for this purpose, is deemed to include a lease of 75 years or more. (Zoning Resolution, Section 12-10)*

Respondent's lease runs until 2052, hence the unexpired term exceeds 75 years, which is also longer than the 45-year average useful life of an office building. (Rev. Proc. 12-21, 1962-C.B. 418)

The leased parcel is occupied by a building which does not contain the maximum floor area permitted under the Zoning Resolution for that parcel. As permitted by the Zoning Resolution, respondent included the surplus floor area attributable to the leased parcel in computing the allowable floor space for the new office building he constructed on his contiguous parcel, and the New York City Building Department issued a building permit on this basis.

Petitioner's theory of the unconstitutionality of zoning that permits such computation of the allowable floor area of respondent's building is that the unused allowable

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* In this respect the zoning is more restrictive than the zoning in effect when the lease in this case was made, for at that time a lessee was deemed to be the owner of premises for zoning purposes regardless of the length of the lease term.

floor area for the leased parcel in which it has a reversion is property belonging to it and that it alone has any right to use such floor area, so that zoning allowing the inclusion of such floor area in the calculation of the allowable floor area of respondent's building is an appropriation without compensation of petitioner's property, although for a period of eighty years, under his lease, respondent alone has the right to make any additional use of the demised premises and the lease in no way limits respondent in use of the excess floor area as allowed by the applicable zoning. As the New York Supreme Court put it, respondent has "complete physical control of both buildings for the apparent life of the structures. This complete physical control effectively welds the two structures into one floor area ratio. Indeed, this intent is written into the zoning law by permitting development under this very circumstance" (Petition, Appendix C at 17a).

The petition misstates that it is "uncontroverted in the record" that use of the excess floor area ("FAR") of the leased parcel by respondent "excludes forever the petitioner's opportunity to utilize such FAR in conjunction with the ownership of adjacent land on the other side of the demised premises." (Petition at 4)* On the contrary, as the New York City Building Department has stated, the right to use the surplus FAR attributable to the leased parcel will revert to petitioner at the termination of the lease, which is as soon as petitioner has any use of the parcel beyond receiving the stipulated rent for the premises (November 5, 1971 letter from Cornelius F. Dennis to Sheldon H. Solow, reproduced in Respondent's Brief to the New York Court of Appeals at pages 13-14 and appended hereto as an Appendix).

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* Petitioner owns no adjacent land. It only poses the possibility that it might sometime acquire such land. Petitioner also seems to suggest that it might sell the excess FAR of the leased premises to another adjacent owner, which would require a sale of the reversion, but plainly petitioner could not thus pass on to a purchaser any use of the FAR during the lease term, for the only right to use of the leased premises is in respondent for the period of the lease.

The Petition Should Be Denied

The petition repeats the challenge to the constitutionality of the Zoning Resolution that was raised briefly in the State courts and rejected without need for discussion. Petitioner's argument, that zoning allowing respondent use of the FAR of the leased premises during the term of his lease deprives petitioner of its property without due process of law, is without basis, for the Zoning Resolution took nothing from petitioner and conferred no property rights on respondent, least of all any property right belonging to petitioner.

FAR is not "property" but a zoning formula for measuring the zoning restriction on building, in this case a restriction on what respondent might build on his own land. Petitioner has been deprived of nothing since under the lease petitioner has no right to use the leased parcel until it reverts in the year 2052, and at that time petitioner will have the right to use whatever FAR the then zoning will allow for building on such premises. No federal question is involved in this case, much less a question of importance to the public as distinguished from the parties.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 25, 1973

APPENDIX

(November 5, 1971 letter from Cornelius F. Dennis to Sheldon H. Solow)

[LETTERHEAD OF DEPARTMENT OF BUILDINGS, HOUSING AND DEVELOPMENT ADMINISTRATION, THE CITY OF NEW YORK]

November 5, 1971

Mr. Sheldon H. Solow
375 Park Avenue
New York, N. Y. 10022

Re: NB 51/67
Block 1273, Lots 22, 24-27,
29, 44, 46, 51-53, 57 and 59

Dear Sir:

Your letter of November 3, 1971 related to the above new building construction site has resulted in a review of the zoning resolution in relation to the definition of Zoning Lot and the potential subdivision of a zoning lot.

In accordance with Section 12-10 of the Zoning Resolution of the City of New York, a zoning lot may consist of more than one lot of record, and part or all of the zoning lot may consist of leased property. The leased property would have to be related to a lease of a lot with a duration of 50 years, with an option to renew so as to provide a total of not less than 75 years duration.

In the event that the lease expired for any reason (prior to or after 75 years), the single zoning lot would be divided into two zoning lots. Each zoning lot would be subject to a zoning review and if one of the lots were found in violation of the Zoning Resolution a suitable violation would be placed, and if not corrected, legal action would ensue.

If the formerly leased zoning lot was found not to be in violation of the Zoning Resolution, and the subdivision was found to be neither consensual nor collusive, no punitive action would be taken against the owner. In such case, the owner of the formerly leased zoning lot would be free to use, alter or build upon his lot without reference to a zoning violation still outstanding on the adjacent zoning lot.

The expiration of the lease after 75 years would be conclusive evidence of a non-consensual or non-collusive situation.

I trust the above discussion adequately summarizes the relevant facts related to a leased zoning lot.

Very truly yours,

CORNELIUS F. DENNIS, P.E.
Cornelius F. Dennis, P.E.
Borough Superintendent
Manhattan